punishment, whether in the form of fine or imprisonment, should always remain fixed with him upon whom it was imposed.[18] The ordinary test of the law as to contribution or indemnity in the case of other elements of damage is inapposite to criminal penalties, because of the stronger policy of repression in the latter.

POSSIBLE INTERESTS IN ONE'S NAME OR PICTURE. — "The law is utilitarian. It exists for the realization of the reasonable needs of the community." [1] So it is not surprising that with the advent of modern photography and the growth of a certain type of unscrupulous journalism the law has come to recognize to a limited extent an individual's right of privacy, a right not to have his personal affairs subjected to public comment and scrutiny without his consent.[2] Yet the courts have handled the matter very unsatisfactorily.[3] A recent case in New York evidences the confusion of thought which pervades the entire subject. The plaintiff secured from an actress the exclusive right to the use of her picture on posterettes. The defendant thereafter with the consent of the actress published and sold posterettes bearing the same picture. The court refused an injunction on the ground that the statutory right of privacy was a purely personal right, and therefore not subject to assignment.[4] *Pekas Co.* v. *Leslie*, 52 N. Y. L. J. 1864 (N. Y. Sup. Ct.).

---

[18] If, in a particular statute, it is not intended to preclude the adjudication of justice between the parties, a clause may be inserted declaring that any fine imposed under its provisions may be recovered in damages. See the English SALE OF FOOD AND DRUGS ACT (1875), § 78. In the absence of such a clause, it should be presumed that no such recovery over was intended.

[1] Ames, "Law and Morals," 22 HARV. L. REV. 110.

[2] Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68; Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Douglas *v.* Stokes, 149 Ky. 506, 149 S. W. 849; Munden *v.* Harris, 153 Mo. App. 652, 134 S. W. 1076; Edison *v.* Edison Polyform, etc. Co., 73 N. J. Eq. 136, 67 Atl. 392; Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193; WIGMORE, SUMMARY OF THE PRINCIPLES OF TORTS, § 148; COOLEY, TORTS, 3 ed., p. 364. In some states the right has been expressly recognized by statute. NEW YORK CONSOL. LAW, ch. 6, §§ 50, 51; CAL. PENAL CODE, § 258. It can be waived by consent or voluntary submission to public scrutiny. Corliss *v.* Walker, 64 Fed. 280. See Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 199, 50 S. E. 68, 72. And it must give way if in conflict with the freedom of the press. Moser *v.* Press Pub. Co., 59 N. Y. Misc. 78, 109 N. Y. Supp. 963. See Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 204, 50 S. E. 68, 74.

[3] The right of privacy, whether recognized or not, is generally considered a personal right. Relief granted: Pavesich *v.* N. Eng. Life Ins. Co., *supra;* Foster-Milburn Co. *v.* Cherin, *supra;* Douglas *v.* Stokes, *supra.* Relief refused: Roberson *v.* Rochester Box Co., 171 N. Y. 538, 64 N. E. 442; Henry *v.* Cherry & Webb, 30 R. I. 13, 73 Atl. 97. But a few courts grant relief on the ground of the violation of a right of property analogous to one's right in the products of his mind, such as unpublished letters, sketches, etc. Munden *v.* Harris, *supra.* Edison *v.* Edison Polyform, etc. Co., *supra.* And there is some judicial expression to the effect that both a personal right and a property right are involved. See the dissenting opinion of Gray, J., in Roberson *v.* Rochester Box Co., 171 N. Y. 538, 561, 564; also Colt, J., in Corliss *v.* Walker, *supra*, p. 282.

[4] NEW YORK CONSOL. LAWS, ch. 6, § 51, provides: "Any person whose name, portrait, or picture is used for advertising purposes or for purposes of trade without written consent first obtained . . . may maintain an equitable action to prevent and restrain

Individual interests are not created by the law. They exist by virtue of the demands which each individual may make as a member of society in so far as such are not outweighed by the like demands of others. Only in so far as the law recognizes these interests are legal rights created.[5] From this standpoint, and considered solely apart from the question of legal rights, an unauthorized publication of one's name or picture may involve at least three distinct interests. First, there may be the interest that his mental peace and comfort be not disturbed by dragging him before the public. This is obviously an interest of personality, and must be recognized if at all as a personal right of privacy.[6] Secondly, there may be the interest in reputation — that he be not held up to hatred, contempt, or ridicule. If infringed, an action for libel will lie, although an interest in privacy may also be involved.[7] Thirdly, there may be an interest in property. Herein lies the confusion. Generally, one's interest that his name or picture be not published broadcast is an interest of personality. But if the owner has treated it as of pecuniary value, or if by virtue of his profession or business it has become such, privacy ceases to be the dominant element, for there is now the distinct interest of substance that no one interfere with that name or picture to detract from its value. A celebrated artist's name is as much a part of his property as the picture he paints, for it gives added value to his productions. Again, if an actress uses her picture as an advertisement, it becomes for her a valuable asset which the law should recognize as property. But the interest of a sensitive girl is far otherwise. She is strongly opposed to publicity. A surreptitious use of her photograph causes her no pecuniary loss whatsoever, but only mental distress. To the actress, however, publicity is the very thing desired. It is another's unauthorized interference with a *pecuniary* interest which she complains of. And just as the interests are distinct, so the rights securing them are distinct.[8] Whether the interest, and consequently the right, is one of substance or of personality must be considered from the

---

the use thereof, and may also recover damages. . . ." The statute is construed as creating a personal right of privacy. Rhodes *v.* Sperry & Hutchinson Co., 193 N. Y. 223, 85 N. E. 1097; Riddle *v.* MacFadden, 201 N. Y. 215, 94 N. E. 644.

[5] Pound, "Interests of Personality," 28 HARV. L. REV. 343.

[6] *Ibid.*, p. 362. Relief may be had by an injunction as well as an action for damages, for the better view is that the restraining power of equity extends over personal as well as property rights. Pierce *v.* Swan Point Cemetery Proprietors, 10 R. I. 227.

[7] Peck *v.* Tribune Co., 214 U. S. 185. See Munden *v.* Harris, 153 Mo. App. 652, 662, 134 S. W. 1076, 1080.

[8] This distinction is clearly recognized in the Civil Law. BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, Vol. 1, §§ 116, 119; ENNECCERUS, LEHRBUCH DES BÜRGERLICHEN RECHTS, *Band* 1, *Abteilung* 1, § 93, (9) NAME. But there is some conflict in the common law. The English doctrine seems to be that the owner must have actually used his name (or picture) in a commercial way, or relief will be refused. Dockrell *v.* Dougall, 78 L. T. 840. See Clark *v.* Freeman, 11 Beav. 112, 119. The better view would seem to be that if one's name had become an asset through reputation the law should protect it as such although not actually put to a business use. Mackenzie *v.* Soden Mineral Springs Co., 27 Abb. N. C. 402, 18 N. Y. Supp. 240. In Edison *v.* Edison Polyform, etc. Co., *supra*, the court based its decision on the broad ground that every private individual has a property right in his name or picture. There was no doubt a property right involved under the particular facts, for the interest of a famous inventor in his picture is clearly one of substance.

standpoint of the individual injured.[9] The difficulty arises in determining which interest is involved in a given set of facts.

Moreover, it would seem that these two rights are exclusive. The use of one's name or picture as property from necessity presupposes publicity to lend it pecuniary value. Again, the very essence of reputation is publicity, so if one's name acquires value through reputation, the interest in privacy is sacrificed. One cannot use his name publicly to any considerable extent and keep it private at the same time. Conversely, if the interest in privacy as such is infringed, no property right in the name or picture can exist. No doubt the unauthorized use by another, although infringing an interest of substance, may cause mental anguish as well as pecuniary loss, as where a reputable physician uses his name on a bottle of medicine and another steals it for advertising some quack remedy. Yet the right violated is still a property right. Reparation for the added mental suffering may be made by giving parasitic damages,[10] but, strictly speaking, no interest in privacy is infringed. The public use of the name refutes any such interest.

In the principal case, the actress treated her picture as property. She consented to its use for a public purpose, and thereby waived any interest in privacy. Consequently, no right of privacy under the statute was involved. But the court should have protected the assignment as a right of property.[11]

RECOVERY FOR GOODS SOLD BY AN ILLEGAL COMBINATION. — Once more the United States Supreme Court has had presented to it the question whether a combination violating the Sherman Anti-Trust Act may recover for goods sold on a contract legal in itself but a part of a scheme to perpetuate the monopoly. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165. The defendant alleged that the plaintiff, an illegal combination, in order to continue its monopoly, had perfected a profit-sharing scheme, which punished the failure to deal with the plaintiff exclusively in any given year by the forfeiture of a rebate on previous purchases. It was also alleged that every contract provided that the goods were not for resale. The court held that these allegations constituted no defense.

Since persons are not ousted from law courts merely because they are

---

[9] This is well illustrated in the case of Ellis *v.* Hurst, 66 N. Y. Misc. 235, 121 N. Y. Supp. 438. The plaintiff, well known as an author under a *nom de plume* which he always assumed, sought an injunction to restrain the defendant from surreptitiously using his true name in connection with an unauthorized publication of the plaintiff's works. No objection was made to the publication of the books themselves. The court rightly granted relief under the New York statute as a violation of the right of privacy. Clearly an interest of personality was alone infringed. But had the plaintiff written under his true name, its unauthorized use would have violated a property right similar in nature to his right in the books themselves.

[10] *Cf.* 27 HARV. L. REV. 87.

[11] The New York statutory right of privacy would seem broader than the common-law right. If the actress had not consented to the use of her picture by the defendant, on the wording of the statute she still had a cause of action against him for using her name for advertising purposes without her written consent, although her interest in privacy was gone.